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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 16

ELIZABETH SIMONSON KING, EXECUTRIX OF THE ESTATE OF GEORGE STEWART KING, DECEASED, AND NATIONAL SURETY CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 12–23) is reported at 208 F. Supp. 697. The opinion of the court of appeals (R. 30–40) is reported at 322 F. 2d 317.

JURISDICTION

The judgment of the court of appeals (R. 40–41) was entered on September 13, 1963. The petition for a writ of certiorari was filed on December 2, 1963, and was granted on January 13, 1964 (R. 42). 375 U.S. 983. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Bankruptcy Act, 30 Stat. 544, as amended, provides in pertinent part:

> SECTION 64 [11 U.S.C. 104]
> Debts which have priority.
>
> (a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * *
>
> * * * * *
>
> (5) debts owing to any person, including the United States, who by the laws of the United States in [1] entitled to priority, * * *
>
> * * * * *
>
> SECTION 337 [11 U.S.C. 737]
> Same; conduct and business after acceptance of the arrangement.
>
> At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—
>
> (1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court in such amount as the court shall fix; and fix the amount or rate of such person's compensation, not in excess of the compensation allowable to a receiver under this title;
>
> * * * * *

[1] The word "in" appears in the original text of the 1938 amendment to the Act. 52 Stat. 874. It probably should read "is."

2. R.S. § 3466, 31 U.S.C. 191, provides:

> § 191. Priority Established.
>
> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

3. R.S. § 3467, as amended, 31 U.S.C. 192 provides:

> § 192. Liability of fiduciaries.
>
> Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

QUESTION PRESENTED

Whether a distributing agent appointed in a proceeding under Chapter XI of the Bankruptcy Act, who does not honor the government's debt priority under R.S. § 3466, 31 U.S.C. 191, is subject to the

imposition of personal liability for the amount of the debt pursuant to R.S. § 3467, 31 U.S.C. 192.

STATEMENT OF THE CASE

This action was brought by the United States against petitioner's decedent, George S. King, the distributing agent in a proceeding under Chapter XI of the Bankruptcy Act, and the National Surety Corporation, the surety on King's bond. The claim was that they were liable under R.S. § 3467, 31 U.S.C. 192, for King's paying the claims of the bankrupt's non-priority creditors and thereby so depleting the assets of the bankrupt's estate that a claim of the United States entitled to priority under R.S. 3466, 31 U.S.C. 191, could not be paid in full (R. 30–31).[2] The relevant facts are stipulated (R. 17).

1. BACKGROUND OF THE LITIGATION

On October 1, 1946, the Seeley Tube and Box Company, Inc., a New Jersey corporation, filed a petition in the district court for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. 701, *et seq.* (R. 13). The United States was not scheduled as a creditor in the petition. However, in annexed schedules, certain executory contracts between Seeley and the Picatinny Arsenal were listed (R. 14). Shortly after the petition was filed, the United States advised

[2] King died testate after the commencement of the action, and petitioner, as his executrix, was substituted as a party defendant. An action by the United States against a fiduciary under R.S. § 3467, 31 U.S.C. 192, does not abate when the fiduciary dies, but survives against his executrix. See *United States v. Dorey*, 39 Fed. 251 (C.C., S.D.N.Y.).

Seeley of its intention to terminate the executory contracts because of Seeley's default in performance. The contracts were terminated on November 18 and 19, 1946, and Seeley was advised that it would be liable for any damages which might result from the reletting of the contracts (R. 13). Such damages did in fact result.

An amended plan of arrangement was filed by Seeley on February 28, 1947. It provided for the payment in full of all unsecured creditors, but did not contain any written provisions for payment of the then unliquidated claim of the United States (R. 5, 32). On March 17, 1947, a referee in bankruptcy appointed George Stewart King, petitioner's decedent and the then president of Seeley, as Seeley's distributing agent in bankruptcy (R. 13, 31–32). King filed a $10,000 bond of the National Surety Corporation as surety for the faithful performance of his duties; the amount of the bond was later reduced to $4,000 pursuant to court order (R. 13).

On March 21, 1947, a hearing on the amended plan of arrangement was held before the referee in bankruptcy. The records of the Clerk of the Bankruptcy Court reflect King's appearance in court on that date. Also present was the attorney for the debtor corporation, Mr. Freeman (R. 14, 15). During the course of the hearing, the referee inquired about the possibility of a claim being filed by the Picatinny Arsenal. Freeman acknowledged that "[t]he Picatinny Arsenal may have some claim," and that "they may claim $20,000" (R. 14). Freeman then asserted that

"the debtor company will deposit any sum of money that is represented by any claim that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it" and, further, that "[w]e have $94,000 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000 or more available to dispose of that claim in cash" (R. 14–15). The referee then entered an order confirming the plan of arrangement and directing King to carry it out (R. 11, 14). Shortly thereafter, the referee also entered an order directing the United States to file its claim on or before May 9, 1947 (R. 15).

On May 9th, the United States filed its preliminary contingent proof of claim in the amount of $26,818.82,[3] and asserted priority of the claim under Section 64 of the Bankruptcy Act, 11 U.S.C. 104, and R.S. § 3466, 31 U.S.C. 191 (R. 15–16). However, between March 21—the date of the hearing at which the plan of arrangement was approved—and May 9—the date that the United States filed its claim—most of the funds which had been deposited with King as distributing agent had been paid out by him to other creditors of the debtor, and only $6,085.01 of $160,193.68 remained (R. 14, 16). The payments had been made by check, and each check had been issued pursuant to a court order and countersigned by the referee in bankruptcy (R. 16).[3] King paid $42,829.76

[3] The claim was amended on March 30, 1949, to $34,125.03, after the damages sustained by the government due to Seeley's default had been more accurately determined (R. 16).

to himself, as a creditor of the bankrupt.' Of the $6,085.01 of the debtor's assets which remained, $1,407.07 was later paid to creditors who did not have a priority over the United States, and $1,057.55 was paid to creditors who did have such a priority (*Ibid.*) Thus of the original $160,493.68 the debtor corporation had deposited with King for the payment of all creditors, only $3,620.39 was paid to the United States on its priority claim of $34,125.03.

On December 8, 1953, the referee in bankruptcy ruled that the United States' claim of May 9, 1947, had been timely filed and that the debtor's plan of arrangement had been confirmed upon the condition that adequate provision be made for payment of the government's claim in the event it was determined to be allowable in an amount not in excess of $94,000 (R. 16). On review, the district court reversed, holding that the claim of the United States had not been timely filed. *In Re Seeley Tube & Box Co.*, 120 F. Supp. 269 (D.N.J.). The court of appeals in turn reversed the district court, *In Re Seeley Tube and Box Company*, 219 F. 2d 389 (C.A. 3), certiorari denied, 350 U.S. 821, ruling that "[t]he disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was * * * in performance of its duty under the Act and amounted to

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[1] King's Final Petition and Report in the arrangement proceedings, shows that on March 21, 1947, the same day the plan of arrangement was confirmed, King issued two checks to himself for $29,323.59 and $13,506.17, respectively. The Final Petition was Exhibit "A" to the government's complaint in the district court and is a part of the record.

an informal amendment of the list of creditors included in the debtor's schedules." 219 F. 2d at 391.

After King had distributed, in the manner previously indicated, the $6,085.01 of the debtor's assets which remained, he filed his final report and account. On August 2, 1956, the bankruptcy court entered an order approving them, and discharging King and the surety bond (R. 17).

2. PROCEEDINGS BELOW

The United States filed its complaint on July 3, 1958 (R. 1). Count I alleged that King was personally liable under 31 U.S.C. 192 for the unpaid amount of the government's debt[*] because he had failed to make payment to the government as a priority creditor, as required by 31 U.S.C. 191 (R. 4–7). Count II alleged the liability of National Surety to the extent of its bond on King's behalf (R. 7). On King's death, petitioner, his widow and executrix, was substituted as party defendant (R. 30, n. 1).

The district court dismissed the complaint (R. 23), holding that King, as a distributing agent in bankruptcy, was not within the class of persons subjected to liability by 31 U.S.C. 192 (R. 21). Reading the statute narrowly, the court concluded that it applied to those persons enumerated therein, *i.e.*, executors,

[*] After the allowance of certain credits and deductions, the United States' claim of $34,125.03 was reduced to $25,831.08. This sum was sought from King. Judgment for $10,000, the amount of its bond, was sought from the surety company (R. 7).

administrators, and assignees, and only to such "other person[s]" as are direct personal representatives of the debtor. It concluded that King was not such a personal representative, but acted for and with the approval of the bankruptcy court.[6] The court of appeals reversed.

SUMMARY OF ARGUMENT

This case involves the application of two intimately related statutes which date from the early days of the Republic. Section 191 of Title 31 provides that the assets of an insolvent person or the estate of a deceased debtor shall first be applied to the satisfaction of claims of the United States. Section 192 provides that any fiduciary (defined to include "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts") shall be personally liable if he fails to honor this priority. These sections, it has long been recognized, are to be read together and to be liberally construed in the light of their fundamental objective: to protect the revenue of the United States.

In the instant case, the distributing agent appointed in a bankruptcy proceeding failed to satisfy the claims of the United States although, as president of the bankrupt corporation, he was fully aware of those

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[6] The district court relied upon *United States* v. *Stephens*, 208 F. 2d 105 (C.A. 5) and the district court's decision in *United States* v. *Crocker*, 194 F. Supp. 860 (D. Nev.), both of which involved the liability of receivers under 31 U.S.C. 192. The *Crocker* case was reversed on appeal. 313 F. 2d 946 (C.A. 9).

claims. Instead, he satisfied the claims of non-priority creditors, himself included. In a subsequent proceeding instituted by the United States pursuant to 31 U.S.C. 192, the court below held that petitioners—the executrix of the estate of the distributing agent and his surety—were liable for his delinquency. The objections to this ruling are, we summit, unfounded.

It is argued that the language of Section 192 (in particular, its reference to one "who pays, * * * any debt due by the person or estate for whom or for which he acts") provides only for the liability of a personal representative, and that a distributing agent is outside this category because he is an officer of the court rather than a representative of the debtor. The short answer is that he is both: in making payments, he acts for the insolvent debtor *and* under the supervision of the court. The section cannot reasonably be construed as inapplicable to the present case. It provides for the liability of every "executor, administrator, or assignee, or other person, who pays", etc. Executors and administrators, who are specifically named in the statute, are obviously no less officers of the court than are receivers or distributing agents. Consequently, amenability to judicial supervision can not make a difference. Nor is there any rational or historical basis for imputing to Congress a purpose to afford the claims of the United States less protection when they run against an insolvent than when they are asserted against a decedent's estate.

The distributing agent is not saved from liability because the distributions made in derogation of the

government's priority were in terms covered by an order approved by the bankruptcy court. It is the agent's duty, in submitting a plan of distribution for approval, to apprise the court of any priorities for which provision must be made. This, the distributing agent here failed to do. The law does not permit him to profit from an intentional or negligent failure to disclose information which, if made available to the court, would presumably have affected its actions. *Field* v. *United States*, 9 Pet. 182.

ARGUMENT

INTRODUCTION

In this case, King, the president of a corporation which had filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, was appointed as distributing agent. Notwithstanding his awareness of the corporation's indebtedness to the United States, he distributed its assets to other creditors. This included a payment to himself which exceeded the amount of the corporation's unpaid obligation to the government.

The single question that was raised in the courts below and in the petition for certiorari was whether, in these circumstances, the distributing agent became personally liable for the corporation's debt to the United States by virtue of 31 U.S.C. 192, formerly R.S. 3467. Under that statutory provision, which derives from an enactment of the Fifth Congress in 1799, "[e]very executor, administrator, or assignee, or

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[7] *Supra*, p. 7.

other person" who acts for a debtor is "answerable in his own person and estate" for the failure to honor the government's debt priority. Petitioners insisted that a distributing agent is not within that class.

In their brief on the merits in this Court, however, petitioners attempt to avoid liability on two grounds not urged at any prior stage of the litigation.

First, they urge that the distribution by King was not in derogation of the government's debt priority under 31 U.S.C. 191, formerly R.S. 3466. Under that provision, which goes back to an enactment of the First Congress in 1789, debts due to the United States must be first satisfied "[w]henever any person indebted to the United States is insolvent"—including situations in which the person's insolvency has been manifested by the commission of "an act of bankruptcy." Petitioners now suggest that there has been no showing that the debtor corporation was legally insolvent or that it committed an act of bankruptcy.

Secondly, petitioners say that, even if it be concluded that Section 192 applies to distributing agents and that King failed to honor the government's debt priority under Section 191, there is no liability because King did not receive all of the debtor's assets. Petitioners read Section 192 as not coming into play unless the fiduciary is vested with the entire estate of the debtor.

We submit that neither of these contentions is properly before this Court under Rule 23(c). The petition for certiorari was based exclusively on an

assertion of a conflict between the court below and the Fifth Circuit[8] on the question whether fiduciaries such as receivers and distributing agents are within the ambit of Section 192. The government acknowledged this conflict and this Court presumably decided to review the ruling below for the sole purpose of resolving it.

In any event, neither of petitioners' belated assertions has any substance. Their present claim (Br. 10–13) that the debtor corporation was not shown to have been legally insolvent cannot be squared with the Chapter XI petition filed by the debtor corporation. In that petition, executed by King, who was then president of the corporation, it was necessarily asserted, in order to give the bankruptcy court jurisdiction, that the corporation was insolvent or unable to pay its debts as they matured. Section 323 of the Bankrutpcy Act, 11 U.S.C. 723.[9] Thus, there was either a literal admission of insolvency or an admission of insolvency in the bankruptcy sense. See *In Re Trans-Pacific Corporation*, 76 F. Supp. 623, 625 (S.D. Calif.), affirmed, 166 F. 1021 (C.A. 9), certiorari denied, 335 U.S. 815. In these circumstances, there was plainly no occasion for the government to allege or prove affirmatively the corporation's insolvency.

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[8] *United States* v. *Stephens*, 208 F. 2d 105.

[9] The section provides:

A petition filed under this chapter shall state that the debtor is insolvent or unable to pay his debts as they mature, and shall set forth the provisions of the arrangement proposed by him, or, that he intends to propose an arrangement pursuant to the provisions of this chapter.

Equally unsound is petitioners' contention (Br. 13–16) that the debtor committed no act of bankruptcy. The debtor's petition for an arrangement under Chapter XI would clearly qualify as the sixth act of bankruptcy enumerated in Section 3(a)(6) of the Bankruptcy Act, 11 U.S.C. 21(a)(6).[10] See *In Re Rodgers-Meyers Furniture Co.*, 46 F. 2d 121, 122 (N.D. Tex.); 1 Collier, *Bankruptcy* (14th ed), Para. 3.603, p. 511; cf. *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 190. Moreover, it would appear that with the appointment of the distributing agent in the proceeding there was an act of bankruptcy within the fifth provision of the Act, Section 3(a)(5), 11 U.S.C. 21(a)(5).[11]

Nor are petitioners aided by the bizarre claim (Br. 16–18) that the distributing agent was not in possession of the entire assets of the debtor corporation's estate. Petitioners point to nothing in Section 192 which could possibly be read as imposing the requirement that the person who pays the debtor's debts in knowing disregard of the priority of the United States must be possessed of all of the debtor's assets

[10] That section provides in pertinent part:

"Acts of bankruptcy by a person shall consist of his having * * * (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt."

[11] "Acts of bankruptcy by a person shall consist of his having * * * (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

Collier indicates that the term "receiver or trustee" was no doubt intended to include also other distributors. 1 Collier, op. cit., Para. 3.502, p. 501, Para. 3.503, pp. 502–503.

before he can be held personally liable. It is indeed incredible that Congress would impose such a restriction. It could serve no purpose except to invite fiduciaries to avoid the consequences of ignoring the government's debt priority by the simple expedient of having the debtor withhold some small part of his assets.

We turn accordingly to the single question presented by the petition.

A DISTRIBUTING AGENT APPOINTED IN PROCEEDINGS UNDER CHAPTER XI OF THE BANKRUPTCY ACT IS PERSONALLY LIABLE FOR THE KNOWING FAILURE TO HONOR THE UNITED STATES' DEBT PRIORITY

1. THE PRIORITY STATUTES ARE TO BE LIBERALLY CONSTRUED IN LIGHT OF THEIR OBJECTIVES

The priority statutes, 31 U.S.C. 191 (formerly R.S. 3466) and 31 U.S.C. 192 (formerly R.S. 3467) are derived from Congress' earliest efforts to secure revenues for the federal treasury. Section 191's precursors, which date back to the first Congress,[12] initially accorded the government a priority in connection with bonds given to insure payment of customs duties. Later, a much broader priority was given, one providing that any debt due to the United States was to be first satisfied whenever any person indebted to the United States by bond or otherwise was insolvent[13] or,

[12] Act of July 31, 1789, Ch. 5, § 21, 1 Stat. 29, 42; Act of August 4, 1790, Ch. 35, § 45, 1 Stat. 145, 169; Act of May 2, 1792, Ch. 27, § 18, 1 Stat. 259, 263.

[13] *I.e.*, when the debtor, not having sufficient property to pay all of his debts, made a voluntary assignment or when the estate of an absconding, concealed, or absent debtor was attached, or when an act of legal bankruptcy was committed.

in the case of a deceased debtor, where the estate was insufficient to pay all of the debts.[14] This provision was carried forward in R.S. 3466 and codified in 31 U.S.C. 191.[15]

Section 192, which dates back to 1799,[16] is in *pari materia* with 31 U.S.C. 191, *United States* v. *Butterworth Corp.*, 269 U.S. 504, 513, *Bramwell* v. *U.S. Fidelity Co.*, 269 U.S. 483, 490; it subjects to personal liability any person who pays the debtor's debts in knowing disregard of the government's priority under Section 191. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 439; *United States* v. *Crocker*, 313 F. 2d 946, 948 (C.A. 9). See, also, *United States* v. *Oklahoma*, 261 U.S. 253, 259–260.

Both sections, this Court has stated, are to be liberally construed, *United States* v. *Emory*, 314 U.S. 423, 426; *Bramwell* v. *U.S. Fidelity Co.*, 269 U.S. 483, 487; their objectives are not to be defeated "by unnecessarily restricting" the statutory terms "within a narrow or technical meaning." Cf. *Price* v. *United States*, 269 U.S. 492, 500. Thus, the burden is on those claiming exemption from the operation of the statutes to show that they do not come within their provisions. See *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 134.

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[14] Act of March 3, 1797, Ch. 20, § 5, 1 Stat. 512, 515.

[15] In bankruptcy matters, the priority conferred on debts of the United States by 31 U.S.C. 191 is incorporated into Section 64a(5) of the Bankruptcy Act, 11 U.S.C. 104a(5). That section is applicable to Chapter XI proceedings. See 8 Collier, *Bankruptcy* (14th ed.), Para. 1.19, p. 39, and Para. 5.33, p. 702.

[16] Act of March 2, 1799, Ch. 22, § 65, 1 Stat. 627, 676. With minor changes, this Act became R.S. 3467, now 31 U.S.C. 192.

B. DISTRIBUTING AGENTS ARE WITHIN THE SCOPE OF 31 U.S.C. 192.

Petitioners rely largely (Br. 18–19) upon *United States* v. *Stephens*, 208 F. 2d 105 (C.A. 5), which held that a court-appointed receiver is beyond the reach of Section 192. In support of its view that the statutory phrase "or other person" refers only to persons standing as personal representatives of the debtor, the Fifth Circuit (208 F. 2d at 108) drew not only upon "the principle of *ejusdem generis* but * * * the language qualifying 'person' as one 'who pays in whole or in part any debt *due by the person or estate for whom or for which he acts.*" [Emphasis in original.] It reasoned that a receiver is not such a personal representative but is to be viewed solely as an "officer or arm of the court." 208 F. 2d at 109. We disagree.

1. To begin with, the Fifth Circuit's analysis gives no weight to the consideration that Section 191 grants the United States priority in respect of all of the debtor's obligations to it, and that the cognate provision (Section 192), if it is to be given a reading consistent with the congressional scheme, must logically embrace all of those fiduciaries who dispose of the debtor's assets in derogation of that priority.

Even if it were permissible, however, to read Section 192 *in vacuo*, the *Stephens* construction would be unwarranted. The Section in terms applies to "[e]very executor, administrator, or assignee, or other person, who pays * * * any debt due by the person or estate for whom or for which he acts * * *." Receivers and distributing agents are persons who pay the debts

of another. And it seems equally clear that, in doing so, they are acting, in the most meaningful sense, for the debtor. Here, for example, King was acting on behalf of the debtor corporation in paying its debts in accordance with the plan of distribution which the corporation had prepared."

The *Stephens* opinion laid stress upon the fact that the receiver there involved was an "officer or arm" of the court. This is invariably true; a receiver either has a court appointment or is the custodian of property under the court's supervision.[18] It does not follow, however, that Congress regarded fiduciaries as persons acting on behalf of the court, instead of for the debtor, within the meaning of Section 192, merely because of their status as court appointees. This is evident from the express inclusion of administrators in the class of persons who pay debts "due by the person or estate for whom or for which he acts." An administrator, in common with a receiver or distributing

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[17] The Ninth Circuit has stated, *United States* v. *Crocker*, 313 F. 2d 946, 949:

"[T]he debts paid by a liquidating receiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase 'for whom or for which he acts' should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191."

[18] This Court and the lower federal courts have recognized that a receiver is regarded as an "officer or arm of the court" because of the fact that he acts under a court appointment. See *e.g.*, *Crites, Inc.* v. *Prudential Co.*, 322 U.S. 408, 414; *Bowersock Mills & Power Co.* v. *Joyce*, 101 F. 2d 1000, 1002 (C.C.A. 8); *Phelan* v. *Middle States Oil Corporation*, 154 F. 2d 978, 991 (C.C.A. 2).

agent, acts under a court appointment. Moreover, both administrators and executors (who are also designated *eo nomine* in Section 192) must obtain court approval of their disbursements. Thus, these fiduciaries are also necessarily "officers of the Court". See *e.g.*, *Byers* v. *McAuley*, 149 U.S. 608, 615.

There is no foundation, then, for the Fifth Circuit's exclusion of receivers on principles of *ejusdem generis*. Just as in a real sense an administrator is acting for the decedent's estate—and not the probate court which appointed him—in paying its debts, so, too, the court-appointed receiver or distributing agent acts for the insolvent in satisfying its obligations. That each such fiduciary, by reason of his court appointment or the court's supervision of his acts, may be regarded as an "officer or arm" of the court does not justify the conclusion that he is not also discharging obligations of the decedent or insolvent in a representative capacity.

2. The difficulties in petitioners' suggested reading of Section 192 are brought into still sharper focus when one turns to the underlying legislative purpose. As previously noted, and as petitioners themselves acknowledge (Br. 11), it has long been recognized that Section 192 is in *pari materia* with Section 191. Under petitioners' construction of section 192, however, the government's debt priority established by Section 191 would be unenforceable in the substantial number of instances where the estate of the insolvent debtor is being distributed by a court-appointed fiduciary.

There is nothing in the legislative background of Section 191 to suggest that the extent of the protection accorded to the government's debt priority should turn upon such considerations as whether the debtor's assets are under the control of a fiduciary acting under a court appointment or one selected by the debtor or some third party. Nor is there any basis for imputing to Congress the belief that the debt priority provided by Section 191 is entitled to greater dignity where the debtor is an insolvent decedent's estate rather than (as here) an insolvent corporation. Yet petitoners' theory necessarily draws a distinction between the two classes of debtors.

In the case of an insolvent decedent's estate, the Section 191 debt priority will always enjoy the protection of Section 192. As has been noted, the latter Section expressly applies to "[e]very" executor and administrator, whether designated by the decedent or appointed by the court and without regard to the fact that the administration of the estate is subject to judicial supervision. But where the insolvent estate is that of a living person or corporation, and a receiver or distributing agent rather than an executor or administrator is therefore involved, petitioners would restrict the protection of Section 192 to those situations in which the debt priority was disregarded by a person other than a court-appointed fiduciary.

In contrast to the Fifth Circuit's decision in *Stephens*, both the court below and the Ninth Circuit, see *United States* v. *Crocker*, 313 F. 2d 946, hold that court-appointed distributing agents and receivers come within the statutory terms. Moreover, this

Court and other courts of appeals have enforced Section 192 as against fiduciaries other than those designated by the debtor. For example, in *Bramwell* v. *U.S. Fidelity Co., supra,* this Court upheld the application of Section 192 to a State official charged with the function of liquidating the assets of a bank. And in *United States* v. *Kaplan,* 74 F. 2d 664, the Second Circuit ruled that the section extends to a trustee in bankruptcy.[19]

We submit that Section 192 applies to all fiduciaries, regardless of the source of their authority, to the extent that they are charged with, or undertake the responsbility for, the payment of the debts of an insolvent person or estate. If, in the execution of their responsibility, they knowingly fail to honor the government's debt priority under Section 191—as King was found to have done here—they subject themselves to personal liability.

C. THE DISTRIBUTING AGENT'S LIABILITY UNDER 31 U.S.C. 192 IS NOT AFFECTED BY THE FACT THAT HE COMPLIED WITH A PLAN OF DISTRIBUTION APPROVED BY THE BANKRUPTCY COURT

Alternatively, petitioners suggest (Br. 20) that, even if court-appointed receivers are subject to Section 192, distributing agents are not. In this connection they seek to depict a distributing agent as one possessing the limited role of executing court-

[19] The Fifth Circuit itself, subsequent to *Stephens* and without reference to it, applied Section 192 to an officer-director of a liquidating corporation. *United States* v. *Lutz,* 295 F. 2d 736. While the result in *Lutz* may be reconcilable with that in *Stephens,* it is noteworthy that, unlike in *Stephens,* the court there expressly indicated its awareness that Sections 191 and 192 are in *pari materia.* 295 F. 2d at 742.

approved orders pertaining to the distribution of the insolvent's assets." On this basis, they conclude that he has no independent responsibility upon which the imposition of liability under Section 192 could properly be rested. The argument falls with its premise.

1. Granting that the functions of a receiver may be broader than those of a distributing agent, for purposes of Section 192 no meaningful distinction can be drawn between the two. That Section is concerned with the performance of a single function: the distribution of the assets of an insolvent against whom the government has a priority claim. In this respect, the distributing agent's responsibility is no narrower than that of a receiver. Indeed, in performing his duties he acts in lieu of a receiver or trustee in bankruptcy.

Section 337 of Chapter XI of the Bankruptcy Act (11 U.S.C. 737) provides that, after the acceptance of the arrangement submitted by the debtor, the court or referee is to "appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor." Thus, a distributing agent (*i.e.*, the "other person") is appointed only where there is no appointment of a receiver or trustee. And he has precisely the same duties of receipt and distribution of the debtor's assets, and is subject to the same control by the court, as the receiver or trustee.

2. Nor is it significant that King's distributions to himself and other creditors of Seeley—in disregard of the government's priority—was pursuant to a court-

approved order. Contrary to the implication of petitioners' brief, the bankruptcy court does not (and is not expected to) undertake either to initiate the plan of distribution or to determine *ab initio* whether there are debt priorities which must be taken into account in the distribution. Rather, it is the distributing agent's duty, in submitting the plan of distribution for judicial approval, to apprise the court of any priorities for which provision must be made.

King failed to perform this duty. Although he well knew, as president of the debtor corporation, that the government had a priority claim, the plan of distribution he submitted to the court did not make allowance for it. Thus the approval of the plan by the court (in the exercise of its general supervisory powers over the execution of the Chapter XI arrangement) obviously resulted from a lack of awareness on the court's part of the priority claim—not from any determination by the court, binding upon King, that Section 191 was to be ignored. There is thus no occasion here to consider what the effect of court approval would have been if the court had been informed of the failure to make provision for the priority claim and the government had been given notice of the plan submitted. We acknowledge that in those circumstances court approval might well constitute a defense to an independent action instituted by the United States under Section 192.

However, to permit *pro forma* court approval to serve here as a shield against the imposition of liability under Section 192 would not only frustrate the

Congressional objective of protecting the public revenues but would invite the abuse of the judicial process. A premium would be placed upon the intentional or negligent failure to disclose information which, if available to the court, would have bearing upon the action taken by it.

For these reasons, similar attempts to avoid liability on the strength of court approval of a plan of distribution have been decisively rejected. Thus, in *Field* v. *United States*, 9 Pet. 182, the United States brought suit against the assignees of the creditors of an insolvent debtor. The complaint alleged that the defendants had disposed of the insolvent's property without first satisfying a debt which was due to the United States. It was asserted that the defendants were aware of that debt, which was entitled to priority under the 1799 predecessor of 31 U.S.C. 191. In this Court, the defendants' principal assertion was that their distribution of the insolvent's estate to creditors other than the United States was pursuant to a tableau of distribution which had been confirmed by a court order. They urged that they were obliged to comply with the order of confirmation and to pay the proceeds of the sale of the insolvent's property to the creditors named in the tableau.

In response to this argument, Chief Justice Marshall pointed out that, before the confirmation of the tableau, the defendants had received notice of the debts due the United States. Having such notice, it was their duty "to have made known those debts in

their tableau of distribution, as having * * * priority" 9 Pet. at 201. Accordingly, the Court concluded, the district court had correctly determined that the judicial approval of the tableau of distribution was not a defense to the liability of the defendants.

In reliance on the *Field* decision, *United States* v. *Barnes*, 31 Fed. 705, 707 (S.D.N.Y.), similarly held that "[s]uch is the rigor of the statute that [the assignee in bankruptcy] cannot invoke the judgment of a court of competent jurisdiction directing him to distribute the assets to specified creditors as a justification, when it does not appear that the United States were a party to the proceeding, or that he took proper measures to secure the priority of the United States in the distribution." See, also, *United States* v. *Weisburn*, 48 F. Supp. 393, 397 (E.D. Pa.), holding that where there has been a failure to apprise the court of the government's priority, "neither a discharge of an executor of an insolvent estate, an approval of his account, nor the distribution of assets, relieve him from liability for debts due to the United States." [20]

[20] Petitioners' reliance (Br. 22) upon *In re Empire Shoe Corporation*, 16 F. Supp. 713 (S.D.N.Y.) is misplaced. That case did not involve the responsibility of a distributing agent to bring the existence of a debt priority of the United States to the court's attention. Moreover, the claim of the creditor in *Empire Shoe* had been scheduled for payment and the court determined that the creditor's failure to receive payment was due to its own laxness rather than to misconduct upon the part of the distributing agent. In the present case, there can be no question that the United States was not responsible to any extent for the failure of King to recognize its debt priority.

CONCLUSION

It is respectfully submitted that the judgment of the court of appeals should be affirmed.

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